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No. 85-1394

Supreme Court, U.S.
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IN THE

SUPREME COURT

OF THE
UNITED STATES

OCTOBER TERM, 1985

DAVID F. HAGLER,

Petitioner,

v.

WILLIAM L. CALLAHAN, ET AL.,

Respondents.

CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a state court waives a procedural default for purposes of federal habeas corpus review under 28 U.S.C. § 2254 by adopting and applying the same procedure applicable to the review of a federal conviction under *United States v. Frady*, 456 U.S. 152 (1982) (§ 2255 case), requiring the petitioner to meet a burden of demonstrating actual and substantial prejudice?

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties named in the caption of this case, Kenneth O. Eikenberry, Attorney General of the State of Washington, was a respondent in the District Court and an appellant in the Court of Appeals.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceedings Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
Argument	4

TABLE OF AUTHORITIES

Cases:	Page
Francis v. Henderson, 425 U.S. 536 (1976)	7
Hagler v. Callahan, 764 F.2d 711 (9th Cir., 1985)	1, 2
Hockenbury v. Sowders, 620 F.2d 111, 116 (6th Cir., 1980)	6
Hockenbury v. Sowders, 633 F.2d 453 (6th Cir., 1980)	6
In re Hagler, 97 Wn.2d 818, 650 P.2d 1103 (1982)	3, 5, 7, 8
In re Hews, 99 Wn.2d 80, 660 P.2d 263 (1983)	5, 7
Rose v. Clark, _____	4
Sandstrom v. Montana, 442 U.S. 510 (1979)	4
United States v. Frady, 456 U.S. 152 (1982)	3, 6, 7, 8
Wainwright v. Sykes, 433 U.S. 72 (1977)	6

Constitutions and Statutes:

Federal

United States Constitution, Amendment Fourteen, §1	2

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OPINIONS BELOW

The Report and Recommendation of a United States Magistrate, which was adopted by the District Court, is reproduced as Appendix C. The District Court's Order Adopting the Report and Recommendation is reproduced as Appendix D. The District Court disposition was not reported. The Opinion of the United States Court of Appeals for the Ninth Circuit is reproduced as Appendix A. The Court of Appeals Order Amending its Original Opinion is reproduced as Appendix B. The Amended Court of Appeals Opinion is reported as *Hagler v. Callahan*, 764 F.2d 711 (9th Cir. 1985). The Court of Appeals Order Denying Petitioner's Petition For Rehearing and Suggestion of Appropriateness of Rehearing En Banc is reproduced as Appendix F.

JURISDICTION

The judgment for which review is sought in this Petition is a decision of the United States Court of Appeals for the Ninth Circuit in a federal habeas corpus case by a state prisoner. The Ninth Circuit's Opinion was originally issued on June 18, 1985, and was amended on August 15, 1985, *see Hagler v. Callahan,* 764 F.2d 711 (1985). The Petitioner filed a timely Petition for Rehearing and Suggestion of Appropriateness of Rehearing En Banc, which was denied by Order dated November 18, 1985.

This Cross-Petition for Writ of Certiorari is filed under Supreme Court Rule 19.5. The Respondent received the Petitioner's Petition for Writ of Certiorari on February 19, 1986.

The Respondent/Cross Petitioner believes that this Court has jurisdiction to review the Ninth Circuit's decision under 28 U.S.C. § 1254(1) and § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Fourteen, §1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner Hagler was convicted in Clallam County, Washington of second degree murder on October 5, 1976. No appeal was taken from this conviction.

On December 17, 1980, the Petitioner filed his fourth Personal Restraint Petition in the Washington State Court of Appeals, which was certified to the Washington Supreme Court. The Washington State Supreme Court de-

nied Petitioner's Personal Restrain Petition in *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982). In that case, the Washington State Supreme Court changed Washington State's post-conviction collateral attack law to do away with the previous strict procedural bar, which would have precluded any review whatsoever of the Petitioner's challenge to a jury instruction due to the failure of the Petitioner to have raised that issue in a direct appeal. The state court noted that the old rule of absolute procedural bar had proved to be too blunt an instrument for the delicate operation of determining which claim should be given collateral review.

While specifically noting that the Personal Restraint Petition could not be allowed to deteriorate into a substitute for an appeal, the Washington State Supreme Court relied upon *United States v. Frady*, 456 U.S. 152 (1982) to change the old, strict procedural bar rule into a rule whereby a state habeas corpus petitioner would not be entitled to relief unless the petitioner could shoulder the burden of showing that errors at his trial were to his actual and substantial disadvantage, affecting the entire trial with error of constitutional dimensions.

The Washington State Supreme Court found that Petitioner had failed to demonstrate actual prejudice and denied his Personal Restraint Petition. *In re Hagler*, 97 Wn.2d 818, 650 P.2d 1103 (1982).

Mr. Hagler then sought a Writ of habeas corpus pursuant to 28 U.S.C. § 2254. The District Court rejected the State's affirmative defense of procedural bar and ruled on the merits granting the Petitioner a Writ of habeas corpus. Appendices C and D to this Petition. The State appealed, and a divided panel of the United States Court of Appeals for the Ninth Circuit reversed, holding that the State had met a burden of demonstrating that the jury instruction error was harmless beyond a reasonable doubt. Having reversed on the merits, the Ninth Circuit Court of Appeals found it unnecessary to address the State's argument that the Petitioner's procedural default had not been excused by the Washington State Supreme Court. Appendices A, B, and F to this Cross-Petition; *Hagler v. Callahan*, 764

F.2d 711, 713 (9th Cir. 1985, fn. 2).

The Petitioner has filed a Petition for Writ of Certiorari, arguing that his claim of error under *Sandstrom v. Montana*, 442 U.S. 510 (1979) is similar or identical to the question presented in *Rose v. Clark*, No. 84-1974, *cert. granted*, October 7, 1985. The Respondent now cross-petitions for a Writ of Certiorari from this Court to review whether Washington State's procedural default exception, which allows a state court petitioner to obtain relief only if the petitioner can establish actual and substantial prejudice, has the effect of excusing the procedural default so as to allow for full federal habeas corpus review on the merits under a different standard and burden of proof.

ARGUMENT

The Respondent's Cross-Petition for Writ of Certiorari should be granted so that this Court can determine whether a state court can apply the same burden and standard of proof in a collateral attack upon a procedurally-defaulted claim as that applied by a federal court reviewing a federal conviction without having been deemed to have waived the default in a subsequent federal habeas corpus proceeding under 28 U.S.C. § 2254.

In this case the standard and burden of proof applied by the Washington State Supreme Court in Petitioner's collateral attack upon his conviction was at the opposite end of the spectrum to that applied by the federal district court in Mr. Hagler's habeas corpus proceeding. While the state court placed the burden upon Mr. Hagler to show actual and substantial prejudice resulting from his claim of error, the federal district court required the State to prove beyond a reasonable doubt that Jury Instruction No. 15, an instruction of the type found unconstitutional by this Court in *Sandstrom v. Montana*, 412 U.S. 510 (1979), was harmless.

Because Washington State does not apply a strict procedural bar, but instead reviews the record to deter-

mine whether the Petitioner was actually and substantially prejudiced, the Federal District Court for the Western District of Washington concluded that the State court had ignored the Petitioner's procedural default, and therefore the principles of comity and federalism did not require that the federal courts make a "cause/prejudice" inquiry before considering the merits of his federal constitutional claim. *Report and Recommendation,* Appendix C, p. 5-6.

This case presents the important issue of whether a state court must have an "all or nothing" procedural bar rule. If the District Court's decision is adopted, a state court must either totally bar a claim and not even look at it, or a federal court will interpret the state court's review of the claim to be a review on the merits and undermine the state's procedural default rule. This is not the law and is not in accordance with the comity and federalism concerns attendant to the relationship between federal and state courts in habeas corpus.

Again, it was in Petitioner's case that the Washington State Supreme Court first began to ameliorate its old, strict procedural bar rule, and then, in *In re Hews,* 99 Wn.2d 80, 660 P.2d 263 (1983), completed the transformation into a prejudicial error rule.

The Washington State Supreme Court was concerned that the previous, procedural bar had proved to be too blunt an instrument for the delicate operation of determining claims which should be given collateral review. The Court was concerned that the old rule had put Washington out-of-step with federal courts and had created the possibility that Washington State's personal restraint petition procedure would come to be viewed as the necessary exhaustion of state remedies, rather than a method by which serious constitutional claims may be heard. *In re Hagler, supra.* Washington courts should be able to review challenges to the constitutional validity of its convictions by making a determination of whether the Petitioner was actually prejudiced, without being deemed to have waived, excused, or ignored the Petitioner's procedural default for purposes of a subsequent federal habeas corpus proceeding.

The rule applied by the State of Washington is exactly the same prejudicial error rule that this Court established for review of federal convictions in *United States v. Frady, supra. United States v. Frady* involved a collateral attack on an issue which was procedurally defaulted upon on direct appeal. This Court reviewed the record to determine whether the petitioner could establish actual prejudice resulting from the constitutional error. *United States v. Frady, supra.*

In *Hockenbury v. Sowders,* 620 F.2d 111, 116 (6th Cir. 1980), the Court examined a Kentucky Manifest Injustice rule, which operates as an exception to the general procedural bar, albeit not in the direct appeal context. (Washington State's prejudicial error rule operates primarily in the context of a post-conviction collateral attack upon a claim which was not raised on direct appeal). The Court observed:

> At least some review of the merits of the defendant's claim must be made in order to determine whether to apply the procedural rule or review the merits on the basis of the Manifest Injustice rule.

id at 116.

Subsequently, in denying a Petition for Rehearing, in *Hockenbury v. Sowders,* 633 F.2d 453 (6th Cir. 1980), the Court noted that at the time that *Wainwright v. Sykes,* 433 U.S. 72 (1977) was argued to the United States Supreme Court, Florida had a "fundamental error" exception to its contemporaneous objection requirement. The Sixth Circuit pointed out that this did not convince the Supreme Court that it should take an independent review of a habeas corpus petitioner's claim under the fundamental error standard of review, which had been applied by the state court. In denying rehearing, the Sixth Circuit noted the obvious, that this Court's opinion in *Wainwright v. Sykes, supra* implied a conclusion that a state may decide when it will excuse a procedural default. *Hockenbury v. Sowders,* 633 F.2d at 444.

Accordingly, by reviewing the record to determine whether the Petitioner has met his burden of demonstrating actual prejudice, the Washington State Supreme Court

did not rule on the merits of Mr. Hagler's claim.

Washington State must not be penalized for its efforts to be just and conscientious in reviewing criminal convictions. It is most important to note that Washington State's procedural bar operates in exactly the same manner as a federal procedural bar operates when reviewing a federal court conviction in a § 2255 proceeding. The Petitioner is required to show actual and substantial prejudice resulting from the default, when attacking a federal criminal conviction in a collateral proceeding. *United States v. Frady, supra.*

State and federal prisoners seeking habeas relief must be treated equally. *Francis v. Henderson,* 425 U.S. 536 (1976). If Petitioner Hagler had been convicted in federal district court and procedurally defaulted on his jury instruction claim, the federal district court would require Petitioner to show "actual prejudice" to excuse his procedural default. *United States v. Frady, supra.* Washington State, in *In re Hagler* and in *In re Hews,* adopted this procedure from the then-recent holding of *United States v. Frady, supra.* If a federal court can determine that a § 2255 petitioner has not shown "actual prejudice", without reaching the "merits" of the claim, then so can the Washington State Supreme Court. Justice would not be served if state courts were required to have an "all-or-nothing" procedural bar. Washington State should be allowed to create a prejudicial error exception to its procedural bar without necessarily being deemed to have reviewed the case on the merits and thereby waived the procedural bar.

The principles of comity should preclude a federal court from dictating to the states what type of procedural default rule to apply or how to apply it. The interests of federalism require that § 2254 petitioners be treated in the same manner as § 2255 petitioners.

Petitioner Hagler procedurally defaulted upon his *Sandstrom* claim in state court by failing to challenge the jury instruction on appeal. Because Mr. Hagler failed to establish actual and substantial prejudice resulting from that error, Washington State Court denied relief. The denial of the Petitioner's Personal Restraint Petition was

based upon the same interest in the finality of convictions and pursuant to the same procedure applied by federal courts in reviewing federal convictions. Compare *United States v. Frady, supra* and *In re Hagler, supra.*

The Petitioner's procedural default was not excused by the State Court, and he should be allowed to have his claim reviewed on the merits in federal court under a standard and burden of proof which was the exact opposite of that applied by the State's highest court.

Therefore, this Court should grant the Respondent's Cross-Petition for Writ of Certiorari in order to resolve this on-going conflict between Washington State's highest court and the Federal District Court for the Western District of Washington.

RESPECTFULLY SUBMITTED, this 19th day of March, 1986.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID F. HAGLER,
Petitioner-Appellee,
v.
WILLIAM L. CALLAHAN, et al.,
Respondents-Appellants.

No. 83-4104
D.C. No.
C82-1085V
OPINION

Argued and Submitted—May 9, 1984

Filed June 28, 1985

Before: Betty B. Fletcher and Jerome Farris, Circuit Judges, and William J. Jameson,* District Judge.

Opinion by Judge Jameson; Dissent by Judge Fletcher

Appeal from the United States District Court
for the Western District of Washington
Donald S. Voorhees, District Judge, Presiding

*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

OPINION

JAMESON, District Judge.

The State of Washington has appealed from the district court's decision, adopting a magistrate's recommendation, to grant the petition of David F. Hagler, a Washington State prisoner, for a writ of habeas corpus under 28 U.S.C. § 2254(a). The court concluded that the jury could have improperly convicted Hagler based on a jury instruction declared unconstitutional in *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). We reverse because we find the *Sandstom* error harmless beyond a reasonable doubt based on our decision in *McGuinn v. Crist*, 657 F.2d 1107 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

I. *Facts*

In 1976 a jury found Hagler guilty of second degree murder in the shooting death of an associate named Leif Eric Ellington. The evidence against Hagler was circumstantial, and he presented an alibi defense. Without objection, the state trial court instructed the jury on intent, giving the *Sandstrom* instruction: "The law presumes that every person intends the natural and probable consequences of his own act." *See Sandstrom v. Montana*, 442 U.S. 510, 515 (1979) (holding a similar instruction unconstitutional because a jury could have interpreted it to create a "conclusive" or "burden-shifting" presumption of intent where intent is a necessary element of the crime for the State to prove). *Id.* at 524. Notice of appeal was filed, but neither Hagler nor his trial counsel pursued it.

In 1978 Hagler filed a personal restraint petition[1] in state court challenging the *Sandstrom* instruction but was denied relief. In 1980 Hagler again challenged the instruction in a second personal restraint petition, and the Washington Court of Appeals

[1] "A personal restraint petition requires the court to adjudicate whether the petitioning prisoner is presently detained in violation of either the United States Constitution or the Constitution of the State of Washington." *In re Myers*, 91 Wash. 2d 120, 587 P.2d 532, 533 (1978), *cert. denied*, 442 U.S. 912 (1979).

certified the case to the Washington Supreme Court. The Supreme Court denied relief because it found that Hagler did not raise lack of intent as a defense at trial and thus failed to demonstrate "that he was actually and substantially prejudiced by the instruction that intent could be presumed." *Matter of Hagler*, 97 Wash. 2d 818, 650 P.2d 1103, 1109 (1982).[2]

Having exhausted his state remedies, Hagler filed the present petition in federal district court under 28 U.S.C. § 2254(a). The case was referred to a magistrate who initially recommended denying the petition because the *Sandstrom* error was harmless beyond a reasonable doubt, relying on *McGuinn v. Crist*, 657 F.2d 1107 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982). On reconsideration, however, the magistrate reversed himself and recommended issuing the writ of habeas corpus. Citing *Connecticut v. Johnson*, 103 S.Ct. 969 (1983), the magistrate found: (1) "[the] issue of intent was never affirmatively conceded;" and (2) "substantial evidence was introduced which could have led a jury to conclude that the homicide, regardless of who did it, was something less than intentional." These factors, the magistrate concluded, were sufficient to make this case "readily distinguishable from *McGuinn v. Crist*" and to compel the conclusion that the *Sandstrom* error was not harmless beyond a reasonable doubt. The district court adopted the magistrate's recommendations and issued the writ.

[1] The sole issue before this court is whether the constitutional error in giving the *Sandstrom* instruction is harmless beyond a reasonable doubt.

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[2]The State premises two of its contentions on the findings of the Washington Supreme Court. First, the State argues that the federal district court, like the state court, should have imposed a threshold burden on the petitioner to show (1) cause for his failure to object to the instruction at trial and (2) prejudice resulting from the instruction. Second, the State contends that the district court failed to accord the findings of the state court the presumption of correctness to which they are entitled under 28 U.S.C. § 2254(d). *See Sumner v. Mata*, 449 U.S. 529, 547 (1981). Since we reverse on the basis of our decision in *McGuinn v. Crist*, we do not reach these two contentions.

II. *Connecticut v. Johnson*

Since our decision in *McGuinn*, the Supreme Court, in a plurality opinion, held that the *Sandstrom* error could be harmless only in "rare situations in which the reviewing court can be confident that [the] . . . error did not play any role in the jury's verdict." *Connecticut v. Johnson*, 103 S.Ct. 969, 977 (1983). The Court, however, decided to "leave it to the lower courts to determine whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." *Id.* at 978.

III. *In re Hamilton*

Quoting from *Connecticut v. Johnson*, this court recently observed that the Sandstrom error might not play a role in a jury's verdict "where intent was not in issue nor in dispute" at trial. *In re Hamilton*, 721 F.2d 1189, 1190 (9th Cir. 1983). Conversely, the court also held that "[i]f a criminal defendant's intent is a disputed issue at trial, the reviewing court cannot rationally conclude beyond a reasonable doubt that an unconstitutional *Sandstrom* instruction given to a jury did not taint its verdict even if substantial evidence of intent exists." *Id.* at 1191.[3]

The *Hamilton* court announced a two-step inquiry for determining whether the *Sandstrom* error was harmless. First, the reviewing court must determine whether intent was disputed at trial; if it was, then the error cannot be harmless. If intent was not

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[3]Hamilton had been convicted in state court of mitigated deliberate homicide of his mother. The case was remanded for a review of the record to determine whether intent was in fact a disputed issue at Hamilton's trial. *In re Hamilton* is factually distinguishable from the instant case. As this court noted in its opinion: "Hamilton contends that intent was very much at issue. He asserts that he did not know what he was doing, that he did not recall the act, and that he did not knowingly or purposely kill his mother. Hamilton also presented psychiatric testimony as to his rather bizarre relationship with his mother as well as his history of alcoholism and blackouts from drinking relatively small amounts of alcohol. He also presented psychiatric testimony that at the time of the killing he suffered from a schizophrenic reation and was subject to psychological stress with severe distortion of judgment and perception."

disputed, then the second step is to determine "whether any 'reasonable juror could have given the presumption conclusive or persuasion-shifting effect.' " *Id.* at 1192. The second step is simply a restatement of the well-established inquiry in all harmless constitutional error cases, namely whether the reviewing court can say "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California,* 386 U.S. 18, 24 (1967); *see also Connecticut v. Johnson,* 103 S.Ct. at 981-82 (Powell, J., dissenting). As for the first step, we recognize, of course, that a plea of "not guilty" "controverts the existence of every fact essential to constitute the crime charged." *Davis v. United States,* 160 U.S. 469, 485-86 (1895). In this case, however, whether intent was disputed at trial is a more narrow question. It involves a determination of whether, under the special facts of each case, intent was a live issue, the subject of a minimum of dispute as a practical matter to trigger the corrupting impact of the *Sandstrom* instruction. It is in significant degree determined by the defense presented, the manner of presentation, and the evidence introduced by both parties. *See Conway v. Anderson,* 698 F.2d 282, 285 (6th Cir. 1983).

[2] Beginning the two-step inquiry under the present facts, it is at once plain that intent was not disputed at Hagler's trial. In reaching this conclusion, we rely on our decision in *McGuinn v. Crist,* 657 F.2d 1107 (9th Cir. 1981), *cert. denied,* 455 U.S. 990 (1982).

IV. *McGuinn v. Crist*

In *McGuinn v. Crist* a Montana jury found McGuinn guilty of deliberate homicide in the shooting death of LaRae Alley. The jury had been given the *Sandstrom* instruction on intent. The evidence against McGuinn was circumstantial: the victim was shot four times in the head; McGuinn was seen near the murder site at about the time of the murder; he owned a gun and bullets matching the general description of those used in the crime; he gave conflicting testimony while testifying on his own behalf and his testimony was impeached by other witnesses. 657 F.2d at 1108. Most important, McGuinn relied solely on an alibi defense. *Id.*

In this case Hagler also relied on an alibi defense in the face of circumstantial evidence: the victim was shot three times, twice in the head and once in the abdomen; one of the shots was fired from a distance of 12-18 inches; Hagler was seen with the victim, who was his business associate, shortly before the murder; a gun, belonging to Hagler and matching the description of the weapon used in the shooting, was found in a river not far from the murder scene; witnesses who saw Hagler with the victim shortly before the murder testified that Hagler later requested them to lie to the police.[4] Like McGuinn, "Hagler's main defense was that he had not shot Ellington, and was not present when Ellington was shot."

In *McGuinn* we held that "[i]nsofar was the jury would beyond a reasonable doubt have reached the same conclusion [on the evidence presented], even absent the disapproved jury instruction, the error complained of here is harmless." 657 F.2d at 1108. Alternatively, we also pointed out "that a disapproved jury instruction concerning intention in a trial in which the intention of the accused was not an issue is harmless error beyond a reasonable doubt." *Id.* Because *McGuinn* presented an alibi defense and did not dispute intent at trial, we concluded that the *Sandstrom* error was harmless. *Id.* at 1109.

Since Hagler similarly relied solely on an alibi defense, it is difficult for him now to contend that his own intent or that of an anonymous assailant was disputed at trial. Nonetheless, he contends, and the district court found, that "substantial evidence was introduced which could have led a jury to conclude that the homicide, regardless of who did it, was something less than intentional." The "substantial evidence" consists of four undisputed facts: (1) the victim had a bad temper; (2) the victim drank to excess; (3) the victim owned and was known to recklessly handle guns; (4) any shot fired in the victim's small trailer would necessarily have been fired at close range.

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[4]For a more detailed statement of the facts *see Matter of Hagler*, 650 P.2d at 1105-1106. The court concluded, *inter alia*, that nothing in the record suggests that the victim's death was "unintentional." *Id.* 1106.

[3] The district court concluded that these facts significantly distinguish this case from *McGuinn*. We disagree. The facts may tell us something of the victim's general character, but they say nothing of the assailant's intent at the time of the murder. Taken together, these facts are simply insufficient to make intent a disputed issue for the purposes of this inquiry. Moreover, the facts most strongly reflecting on intent are undisputed: the victim was shot three times, twice in the head, and one of the shots was fired at point-blank range. As in *McGuinn*, the defendant's reliance on alibi and the lack of contrary evidence on intent make it plain that intent was not disputed at Hagler's trial.[5]

[4] Having found that intent was not contested at trial, the court must next assess the weight of the evidence against the defendant to determine whether we can conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. at 24; *Harrington v. California*, 395 U.S. 250, 254 (1969); *In re Hamilton*, 721 F.2d at 1192. We have already noted that the evidence of intent, though necessarily circumstantial, was uncontradicted at trial. As the court observed in *McGuinn*, the victim "was shot four times in the head at close range firmly negating any reasonable possibility that the killing occurred as a result of recklessness or negligence." 657 F.2d at 1108. Here the facts are slightly less egregious, but the victim's three bullet wounds—two in the

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[5]Petitioner also argues, and the district court found, that "[t]he issue of intent was never affirmatively conceded." As is clear from our decision in *McGuinn*, however, no affirmative concession is required of the defendant to render an element of the crime undisputed. 657 F.2d at 1108-09. The Supreme Court did not require an affirmative concession in *Connecticut v. Johnson* when it left the lower courts free to determine "whether, by raising a particular defense or by his other actions, a defendant himself has taken the issue of intent away from the jury." 103 S.Ct. at 978. Even though it was clear in *Hamilton* that the defendant did not affirmatively concede the issue, we remanded the case to the district court to determine, "after an independent review of the state court record," whether intent was contested at trial. 721 F.2d at 1192. *See also Engle v. Koehler*, 707 F.2d 241, 246 (6th Cir. 1983), *aff'd.*, 104 S.Ct. 1673 (1984) (equally divided court); *Conway v. Anderson*, 698 F.2d 282, 285 (6th Cir.), *cert. denied*, 103 S.Ct. 3092 (1983) ("the corrupting effect of a *Sandstrom* instruction is to a great extent a function of the defense, if any, interposed at trial.")

head, one in the abdomen, and one of those at point-blank range—lead us to the same conclusion. Judging from the evidence before it and the absence of any mitigating or conflicting evidence, the jury could not possibly have concluded that the murder was other than intentional.[6] We are convinced that giving the *Sandstrom* type instruction did not contribute to the jury's guilty verdict.

V. *Conclusion*

The court concludes that this case is controlled by our decision in *McGuinn v. Crist*. Having found that intent was not contested at trial and that giving the *Sandstrom* instruction did not contribute to the guilty verdict, we conclude that the error complained of was harmless error beyond a reasonable doubt. Accordingly, the order of the district court granting the petition for a writ of habeas corpus is reversed.

REVERSED.

FLETCHER, Circuit Judge, dissenting:

I respectfully dissent.

I agree with the majority that the trial court's instruction on intent violated Hagler's fourteenth-amendment due process rights by relieving the state of part of its burden of proof in a criminal prosecution, *Francis v. Franklin*, 105 S.Ct. 1965, 1977 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979), and that the sole issue for this court to resolve is whether the trial

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[6]In denying Hagler's petition for restraint, the Supreme Court of Washington, after reviewing the evidence, likewise noted that Hagler had not raised lack of intent as a defense at trial, and that nothing in the record suggests that the victim's death was not intentional. *Matter of Hagler*, 650 P.2d at 1109. Accordingly, assuming that it was error to give the challenged instruction, the court was satisfied from its "review of the records" that Hagler was not prejudiced by the assumed error. *Id.* 1105

court's acknowledged "constitutional error in giving the *Sandstrom* instruction is harmless beyond a reasonable doubt."[1] The Supreme Court has recently questioned whether giving a *Sandstrom* instruction can ever constitute harmless error. *See Francis v. Franklin*, 105 S.Ct. at 1977; *Davis v. Kemp*, 53 U.S.L.W. 3851, 3852 (U.S. June 3, 1985) (White, J., dissenting from denial of certiorari) (indicating that the Court has had four opportunities recently "to decide whether *Sandstrom* error may be harmless under any circumstances"); *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 978 (1983) (plurality opinion) ("[*Sandstrom*] error deprived respondent of 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.' "). This circuit has held that *Sandstrom* error can be harmless under certain limited circumstances. *See, e.g., In re Hamilton*, 721 F.2d 1189, 1190-91 (9th Cir. 1983); *McGuinn v. Crist*, 657 F.2d 1107, 1108-09 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982). Because I conclude that Hagler's case does not constitute one of those "rare situations in which the reviewing court can be confident that [the] *Sandstrom* error did not play any role in the jury's verdict," *Connecticut v. Johnson*, 103 S.Ct. at 977 (plurality opinion), I would affirm the district court and grant Hagler's habeas petition.

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[1]As the majority notes, the Washington Supreme court concluded that Hagler did not raise lack of intent as a defense at his trial, and implicitly ruled that the trial court's *Sandstrom* error was harmless beyond a reasonable doubt. *See In re Hagler*, 97 Wash. 2d 818, 650 P.2d 1103, 1109 (en banc). The harmless error determination clearly involved a mixed question of fact and law; I would also characterize as a mixed question the issue of whether sufficient evidence was introduced at trial to make lack of intent a disputed issue. *See United States v. McConney*, 728 F.2d 1195, 1202-03 (9th Cir. 1984). As a result, neither of the Washington Supreme Court's conclusions involved a strictly "factual issue," and therefore, neither must be "presumed to be correct" by this court under 28 U.S.C. § 2254(d) (1982) in its habeas review. *See Sumner v. Mata*, 449 U.S. 539, 544-548 (1981). Even if the question of whether intent was a disputed issue at trial is treated as a factual determination, and is therefore entitled to section 2254(d)'s "presumption of correctness," I conclude, based upon the record as a whole and especially those portions discussed in this dissent, that the Washington court's determination "is not fairly supported by the record." 28 U.S.C. § 2254(d)(8); *see Sumner v. Mata*, 449 U.S. at 547-552.

This circuit held in *In re Hamilton*, 721 F.2d 1189 (9th Cir. 1983), that unless a defendant clearly concedes or totally fails to dispute the issue of intent at his trial, a "*Sandstrom* error *cannot* be held harmless." *Id.* at 1192 (emphasis added). This court must therefore "determine whether, *by raising a particular defense or by his other action*, [Hagler] himself has taken the issue of intent away from the jury." *Connecticut v. Johnson*, 103 S.Ct. at 978 (plurality opinion) (emphasis added). In this case, the magistrate and district judge both concluded, based upon a full review of the record, that "[the] issue of intent was never affirmatively conceded" by Hagler, and that "substantial evidence was introduced [at trial] which could have led a jury to conclude that the homicide, regardless of who did it, was something less than intentional." I agree with this assessment, and conclude as a result that the trial court's erroneous *Sandstrom* instruction was not harmless beyond a reasonable doubt.

The majority's analysis in this case is flawed in three respects. First, the majority has overstepped this court's bounds in reviewing Hagler's *Sandstrom* claim by evaluating the *quality* and *quantity* of the evidence concerning intent introduced at trial, rather than simply determining whether intent was a disputed issue. The majority correctly notes that under *Hamilton*, even "a minimum of dispute" over the issue of intent is sufficient "to trigger the corrupting impact of [a] *Sandstrom* instruction," and to preclude a determination that giving that instruction was harmless. Yet the majority, although it acknowledges that evidence relating to the issue of intent was introduced at Hagler's trial, nonetheless concludes that this evidence was "simply insufficient" to overcome the other evidence in the record suggesting that the homicide was intentional. In doing so, the majority violates the principles of both *Hamilton* and *Connecticut v. Johnson*, which prohibit courts reviewing *Sandstrom* claims from examining the issue of intent on the merits once they have concluded that it was disputed:

> If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict. *The fact that the review-*

> *ing court may view the evidence of intent as overwhelming is then simply irrelevant.* To allow a reviewing court to perform the jury's function of evaluating the evidence of intent, when the jury may never have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made.

Connecticut v. Johnson, 103 S.Ct. at 977 & n.15 (plurality opinion) (citations omitted and emphasis added); *accord In re Hamilton,* 721 F.2d at 1191 (reversal is required if intent is a "disputed issue . . . *even if substantial evidence of intent exists*") (emphasis added). Thus, once the majority acknowledged that evidence was introduced at trial, no matter how weak, suggesting that the homicide in this case may have been less than intentional, it was required, as a matter of law, to conclude that the trial court's *Sandstrom* instruction could not have been harmless beyond a reasonable doubt.

Second, the majority appears to suggest that the fact that Hagler raised an alibi defense at his trial automatically eliminates the issue of intent. However, both the Supreme Court and this court have recognized that an alibi denfense and a lack-of-intent defense are not necessarily mutually exclusive. In *Connecticut v. Johnson,* the Supreme Court stated that "[i]n presenting a defense such as alibi, . . . a defendant *may in some cases* admit that the act alleged by the prosecution was intentional," thereby making the use of a *Sandstrom* instruction harmless error. 103 S.Ct. at 978 (plurality opinion) (emphasis added). The Court's statement clearly recognizes that defendants raising alibi defenses do *not* automatically concede the issue of intent.

Similarly, in *McGuinn v. Crist,* 657 F.2d 1107 (9th Cir. 1981), upon which the majority relies, this court indicated that a defendant's use of an alibi defense did not automatically prevent him from also raising defenses relating to lack of intent. Although the court ultimately held that the use of a *Sandstrom* instruction at McGuinn's trial was harmless error, it expressly distinguished

between defenses relating to alibi and those relating to lack of intent, and reached its conclusion only after specifically determining that the defendant failed to contest the issue of intent. *Id.* at 1108; *see In re Hamilton*, 721 F.2d at 1191 (concluding that intent was not at issue in *McGuinn*). This court clearly indicated in *McGuinn* that the defendant's claim that *he* did not perform the shooting was not incompatible with a claim that whoever performed the shooting did not *intend* to kill the victim. At Hagler's trial, in addition to advancing an alibi defense, the defense introduced substantial evidence relating to the issue of intent. The district court was absolutely correct in perceiving that this immediately distinguishes Hagler's case from the situation in *McGuinn*.

Finally, the record belies the majority's conclusion that intent was not a contested issue at Hagler's trial.[2] Alibi was surely the primary defense advanced by Hagler's attorney and was obviously the focus of Hagler's own testimony, but the defense of lack of intent was advanced as well. One must take into account that Hagler's assertion of an alibi defense prevented him from admitting to shooting the victim and then testifying concerning his reasons for doing so and his state of mind. Nonetheless, the record vividly demonstrates that Hagler's attorney presented as effective and extensive a lack-of-intent defense as was possible under the circumstances. Regardless of how this court as a fact-finder would resolve the intent issue in Hagler's case, the issue was sufficiently disputed at trial to preclude this court, under the principles of *Hamilton* and *Connecticut v. Johnson*, from holding the trial court's *Sandstrom* instruction to be harmless error.

Through the testimony of various witnesses, Hagler's attorney presented evidence from which a jury might conclude that the

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[2]Unfortunately, the state trial transcript does not contain a record of the parties' closing arguments. Such a record might have clarified exactly what defenses and arguments Hagler's attorney advanced at trial, and might well resolve the question of whether the issue of intent was disputed at Hagler's trial. In the absence of such records, we must extrapolate from the evidence introduced by the defense at trial to determine the theories and arguments it was advancing. *See Conway v. Anderson*, 698 F.2d 282, 285 (6th Cir. 1983).

killing was unintentional. He elicited testimony that the victim, Leif Ellington, regularly drank to excess, and that he was a threatening and dangerous individual when drunk. He introduced Ellington's autopsy which revealed that Ellington was an alcoholic or at least a chronic drinker, and had Ellington's acquaintances confirm that he drank frequently and often became "soused," as one put it. When questioned by Hagler's attorney, the acquaintances characterized Ellington as "mean," "mood[y]," and "ornery" when he was drunk, and acknowledged that he could become violent and extremely dangerous in those situations. For example, Alex Mankoski, a defense witness who said that he had been a "friend" of Ellington's for twenty years, testified that during one such episode about two weeks before Ellington's death, Ellington had "knocked [his] teeth out and broke[n] his glasses." Furthermore, Mankoski suggested that this was not an unusual or isolated occurrence.

Other acquaintances of Ellington testified that when he was drunk, he believed "that a lot of people were out to get him . . . .[and] his money." Still others testified that when he was drunk, Ellington would threaten Lida Pickell, the woman with whom he was living. In fact, a local policeman testified that there had been numerous reports to the police of assaults by Ellington on Pickell, and vice versa.

Moreover, Hagler's attorney introduced testimony concerning Ellington's great physical strength, as well as his fascination with and occasional abuse of firearms. A local police officer testified that Ellington once "ripped the door off the jail," and that he had demonstrated great physical strength on several other occasions. The record also reveals that Ellington was over two hundred pounds.

There was also testimony that Ellington had collected a variety of guns, which he kept in his residential trailer, where he was killed. He would occasionally carry one or more of these with him when he went into town, and he was arrested at least once for doing so. An acquaintance of Ellington's testified that on at least one occasion when he was drunk, Ellington fired his guns off

inside his trailer, and the police found a number of bulletholes in the trailer.

Hagler's attorney introduced evidence that on the day of the murder, Ellington was drinking heavily. By 10:00 A.M., according to Hagler's testimony, Ellington was beginning on his first pint of whiskey; by about 1:30 P.M., he was beginning on another fifth. By 3:00 or 4:00 P.M., according to Mankoski, Ellington joined him for several glasses of wine. Ellington died sometime during the late afternoon or early evening, and his autopsy revealed a blood-alcohol level of .23 grams percent, indicating that he was "significantly and severely under the influence of alcohol" at the time of death.

The testimony adduced by Hagler's counsel, at a minimum, raises questions as to whether the killing was intentional. When drunk, Ellington could be "mean," often turned on his friends and became violent, and occasionally shot off firearms in his trailer; the evidence suggests that Ellington may himself have precipitated the events leading to his death. Because of Ellington's size, strength, and bullying tendencies, any person with him in his trailer on the afternoon of his shooting could have legitimately feared for his or her safety. Two loaded weapons other than the murder weapon were found in the trailer after Ellington's death—one, a 32-caliber revolver, was found lying by Ellington's right hand. Moreover, there may have been a struggle: Ellington had an abrasion above his right eyebrow, with some fresh bleeding from it.

The trajectory of the bullet wounding Ellington in the abdomen was also consistent with the possibility that he was not killed intentionally. In response to questions by Hagler's attorney, the pathologist who performed Ellington's autopsy confirmed that Ellington's abdominal wound could have been sustained as he rose from a sitting position and "c[a]me toward" the shooter. Futhermore, the extremely small dimensions of Ellington's trailer (12 feet by 6-12 feet by 6-1/4 feet) could help to explain why Ellington's wounds were sustained at such point-blank range.

There could have been no other reason for Hagler's attorney to have adduced the evidence relating to Ellington's character, his drinking, his physical strength, his assaults on Mankoski and Pickell, his interest in guns and use of them in his trailer, his prior arrest for carrying a weapon, and the trajectory of the bullet wounding him in the abdomen, other than to raise doubts as to whether his murder was intentional. The Washington Rules of Evidence lend added support to the view that intent was in issue. It is likely that much of the character evidence concerning Ellington would have been inadmissible at trial unless it were introduced to support a claim of lack of intent. *See* Washington Rule of Evidence 404(a)(2) (evidence of character of victim); Fed. R. Evid. 404(a)(2) and Advisory Committee Note on Fed. R. Evid. 404; *see also* Washington Rules of Evidence 401-402 (relevance). Not one objection to the admission of this evidence was raised by the prosecutor. His silence is eloquent testimony to the fact that intent was in issue.

This court is permitted to examine only *whether* the issue of intent was disputed, not how well it was disputed or whether there was substantial evidence to support a finding of intent. *Connecticut v. Johnson*, 103 S.Ct. at 977 & n.15 (plurality opinion); *In re Hamilton*, 721 F.2d at 1191. The harmless-error analysis of *McGuinn*, upon which the majority relies, applies only when intent is *not* disputed by the defendant. *See In re Hamilton*, 721 F.2d at 1191. In this case, in these circumstances, Hagler disputed the issue of intent as best he could without abandoning his alibi denfense. I conclude that the trial court's unconstitutional *Sandstrom* instruction was not harmless beyond a reasonable doubt, and I would therefore affirm the district court and grant Hagler's petition for habeas relief.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID F. HAGLER,	)	
	)	CA No. 83-4104
Petitioner/	)	
Appellee,	)	
	)	DC No C82-1085V
v.	)	(Western Wash.)
	)	
WILLIAM L.	)	ORDER
CALLAHAN, et al.,	)	
	)	[Entered August
Respondents/	)	15, 1985]
Appellants.	)	
	)	

Before: FLETCHER and FARRIS, Circuit Judges, and JAMESON,* District Judge

The majority opinion filed June 28, 1985 is amended as follows. Delete the following citation at lines 8-9, page 6 of the slip opinion: "see also Connecticut v. Johnson, 103 S.Ct. at 981-82 (Powell J., dissenting)."

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*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID F. HAGLER, Petitioner, v. WILLIAM L. CALLAHAN, et al., Respondents.	CASE NO. C82-1085V REPORT AND RECOMMENDATION

INTRODUCTION AND SUMMARY CONCLUSION

Petitioner, a state prisoner at McNeil Island, filed this petition for writ of habeas corpus pursuant to 28 U.S.C. §2254. He seeks relief from his 1976 conviction for second degree murder. Both petitioner and respondents have moved for summary judgment. Having carefully considered the record, I conclude that the error committed at petitioner's trial by the court's use of a constitutionally infirm jury

instruction was not harmless beyond a reasonable doubt. I therefore recommend that the writ of habeas corpus be granted.

PROCEDURAL HISTORY

Petitioner was convicted in Clallam County Superior Court on October 5, 1976, of second degree murder. He did not appeal. In 1978, he filed a personal restraint petition (his second) challenging the constitutionality of jury instruction No. 15,[1] but the petition was dismissed. In 1979, the United States Supreme Court, in the case of Sandstrom v. Montana, 442 U.S. 510 (1979), found an almost identical instruction unconstitutional. Petitioner then filed his first federal habeas petition, No. C79-1193M, in this Court.

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[1] Instruction No. 15 informed jurors that "the law presumes that every person intends the natural and probable consequences of his own acts."

However, that petition was dismissed without prejudice because another personal restraint petition which raised the identical issue remained pending in the State Court of Appeals.

Subsequently, in In re Hagler, 97 Wn.2d 818 (1982), the Washington Supreme Court denied his personal restraint petition. In doing so, however, the court announced new rules regarding state personal restraint petitions. The court stated that its previous "procedural screening process whereby errors, constitutional or otherwise, which are not raised on appeal will not be reviewed in collateral proceedings . . . has proved to be too blunt an instrument for the delicate operation of determining claims which should be given collateral review." Id. at 826. Instead, the Supreme Court held that "in order to prevail in a collateral attack, a

petitioner must show that more likely than not he was prejudiced by the error." Id. Finding that petitioner could not meet this affirmative burden of proof, the State Supreme Court denied the petition.

Thereafter, petitioner filed this, his second petition seeking federal habeas relief under §2254. The undersigned initially recommended that the petition be denied, believing that McGuinn v. Crist, 657 F.2d 1107 (9th Cir. 1981), cert. denied, 445 U.S. 990 (1982), compelled such a result. Because counsel for petitioner was never served a copy of my recommendation, the court vacated its February 7, 1983 order denying the petition and remanded it to me for further briefing and reconsideration. Since the remand, I have benefitted from both the briefing of counsel and the Supreme Court's opinion in

Connecticut v. Johnson, ____ U.S. ____, 74 L.Ed.2d 823 (1983). I now conclude that McGuinn v. Crist, supra, does not mandate a particular result in this case and that petitioner is entitled to the relief sought.

DISCUSSION

Petitioner has clearly exhausted his state judicial rmedies. In Re Hagler, supra. Furthermore, even respondents concede that in petitioner's case the state court, "changed Washington State's post-conviction collateral attack law to do away with its state procedural bar." Respondents' Memorandum of Authorities, p. 2. Because the Washington Supreme Court ignored petitioner's procedural default and chose to decide his case on the merits, the principles of comity and federalism do not require that the federal courts make a "cause/prejudice"

inquiry before considering the merits of his federal consitutional claim.

Two assertions made by respondents must first be dealt with. Respondents have urged that the state court's "finding that petitioner was not actually prejudiced by the giving of jury instruction No. 15 is to be presumed correct" pursuant ot 28 U.S.C. §2254(d). They also contend that "A federal habeas corpus court should apply the same burden and standard of proof as that applied by the highest state court in a collateral attack upon a criminal conviction." Both arguments are plainly incorrect and the second borders on the absurd.

First, the finding of "no prejudice" by the Washington Supreme Court is a mixed question of law and fact, which requires the application of a legal standard to a historical fact determin-

ation. It is therefore a matter for the independent detemination of the federal court, Cuyler v. Sullivan, 446 U.S. 335, 341-42 (1980), and is not entitled to a presumption of correctness.

Second, there is no merit whatsover to the contention that the two federal district courts located in the State of Washington must apply different standards and burdens of proof to federal constitutional claims than the standards applied by federal courts located elsewhere throughout the country. To do so would totally defeat the purpose of federal habeas corpus, which is to ensure uniform federal review of constitutional claims.

> "[T]he federal habeas petitioner who claims he is detained pursuant to a final judgment of a state court in violation of the United States Constitution is entitled to have the federal habeas corpus court make its own independent determination of his federal claim, without being bound by the determination on the merits of that

> claim reached in the state proceedings."

Wainwright v. Sykes, 433 U.S. 72, 87 (1977). The proper standard in this court is whether a proven constitutional violation was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 23 (1967).

There is no question but that the challenged jury instruction was unconstitutional. Respondents have not seriously urged that Sandstrom is not retroactive, but have rested on a footnote argument that the "great degree to which state courts relied upon a Sandstrom-type jury instruction prior to the decision finding said instruction unconstitutional" should preclude retroactive application.

The Sandstrom decision announced a new constitutional rule. Its major purpose was to overcome an aspect of a

criminal trial that substantially impairs the truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials. Cf. Hankerson v. North Carolina, 432 U.S. 233, 243 (1977).

The court in Hankerson, supra, considered and rejected an argument identical to respondents, holding that the rule of Mullaney v. Wilbur, 421 U.S. 684 (1975) must be applied retroactively. Given the similar effect of the Sandstrom and Mullaney instructions, both of which shifted the burden of persuasion and violated the requirement that the state prove every element of a criminal offense beyond a reasonable doubt, there is no basis for distinguishing Hankerson. See also Dietz v. Solem, 640 F.2d 126, 130 (8th Cir. 1981), rev'd on other grounds, 677 F.2d 672 (1982). Petitioner is therefore

entitled to have the new rule set forth in Sandstrom applied to his case.

In Connecticut v. Johnson, supra, the United States Supreme Court affirmed a Connecticut Supreme Court opinion reversing a conviction which involved a Sandstrom-type instruction. A four justice plurality concluded that, except in "rare situations," Sandstrom errors deprive defendants of "constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Connecticut v. Johnson, supra, 74 L.Ed.2d at 835, quoting Chapman v. California, supra. The fifth vote to affirm was provided by Justice Stevens who would have dismissed the writ of certiorari as not presenting a federal question.

An equal number of justices adhered to the view that the harmless error rule announced in Chapman was sufficient.

The dissenting opinion concluded that the case should be remanded to the Connecticut Supreme Court for consideration of the impact of the unconstitutional instruction, given the facts and circumstances of the case.

Although it does not have the binding force of an opinion of the Court, the plurality opinion is persuasive authority for the proposition that Sandstrom errors are almost never harmless "because the jury may have relied on the presumption rather than the evidence." Johnson, at 833 (fn. ommitted). Thus, although the prevailing standard in the Ninth Circuit is still "harmless error," McGuinn v. Crist, supra, any examination of the record should be informed by an awareness of

> "[t]he fact that the reviewing court may view the evidence of intent as overwhelming is then simply irrelevant. To allow a

> reviewing court to peform the jury's function of evaluating the evidence of intent, when the jury never may have performed that function, would give too much weight to society's interest in punishing the guilty and too little weight to the method by which decisions of guilt are to be made."

Johnson, 74 L.Ed.2d at 834 (fn. ommitted).

I find this case readily distinguishable from McGuinn v. Crist, supra, for the reasons suggested by petitioner. While he chose to defend on a theory of alibi, substantial evidence was introduced which could have led a jury to conclude that the homicide, regardless of who did it, was something less than intentional. The issue of intent was never affirmatively conceded. Petitioner was no less entitled to have the jury make its determination on that issue without an unconstitutional presumption, than he was to have them determine his presence or absence at the

time of the victim's death based solely on the evidence before them.

Granted that the evidence against petitioner was strong, it was still only circumstantial. Evidence of excessive alcohol consumption, the victim's bad temper, his penchant for reckless use of guns and the reality that any shots fired inside the trailer would have been fired at "close range" was also introduced. These factors might affect a jury's finding on intent, and were not factors in McGuinn. I am simply not convinced beyond a reasonable doubt that the constitutional error at petitioner's trial was harmless.

I therefore recommend that the writ of habeas corpus be granted. The state should be afforded the opportunity to hold a new trial on the charge of second degree murder within sixty days of the entry of a final judgment. If the state

fails to hold such a new trial within sixty days, petitioner should be released.

A proposed form of Order accompanies this Report and Recommendation.

DATED this 21st day of June, 1983.

/s/
Philip K. Sweigert
United States Magistrate

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVID F. HAGLER, Petitioner, v. WILLIAM L. CALLAHAN, et al., Respondents.	CASE NO. C82-1085V ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

The Court, having considered the petition for writ of habeas corpus, the memoranda of the parties, the Report and Recommendation of United States Magistrate Philip K. Sweigert, and the balance of the records and files herein, does hereby find and ORDER:

(1) Said Report and Recommendation is hereby approved and adopted;

(2) Petitioner is entitled to a writ of habeas corpus;

(3) Respondents may commence re-trial of petitioner within sixty days

after this Order becomes final, including the conclusion of any and all appeals from this Order;

(4) In the event respondents elect not to retry petitioner, or such retrial is not timely commenced, petitioner shall be released forthwith from custody; and,

(5) The Clerk is to direct copies of this Order to petitioner, to all counsel of record, and to Magistrate Sweigert.

DATED this 15th day of August, 1983.

/s/ Donald S. Voorhees
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID F. HAGLER, Petitioner/ Appellee,	) No.	83-4104
v.	)	C82-1085V
WILLIAM L. CALLAHAN, et al., Respondents/ Appellants.	)	

APPEAL from the United States District Court for the [not filled in] District of [not filled in].

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the WESTERN District of WASHINGTON (SEATTLE) and was duly submitted.

ON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is REVERSED.

Filed and entered 6/28/85.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID F. HAGLER, Petitioner/ Appellee,	)	CA NO. 83-4104
v.	)	DC No. C82-1085V (Western Washington)
WILLIAM L. CALLAHAN, et al.,	)	ORDER
Respondents/ Appellants.	)	[Entered November 18, 1985]

Before: FLETCHER and FARRIS, Circuit Judges, and JAMESON,* District Judge

Judge Farris and Judge Jameson voted to deny the petition for rehearing. Judge Farris voted to reject the suggestion for rehearing en banc and Judge Jameson recommended rejection. Judge Fletcher voted to grant the petition for rehearing and the

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*Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and a judge in active service requested that a vote be taken. Fed. R. App. P. 35(b). Upon the vote of the judges in active service, a majority voted against en banc rehearing.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Supreme Court, U.S.
FILED
APR 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1550

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

WILLIAM L. CALLAHAN, WARDEN, ET AL.,

CROSS-PETITIONERS,

v.

DAVID F. HAGLER,

CROSS-RESPONDENT.

BRIEF IN OPPOSITION TO CROSS PETITION FOR WRIT OF CERTIORARI

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Page

Table of Authorities ii

Argument 1

Conclusion 4

Page

Hagler v. Callahan, 764 F.2d 711 (9th Cir. 1985) 1

Hankerson v. North Carolina, 432 U.S. 233 (1977) 2

Stelos v. Hosiery Motormend Corp., 295 U.S. 237 (1935) 2

United States v. Cronic, 466 U.S. 648 (1984). 4

United States v. Raines, 362 U.S. 17 (1960) 2

The Cross-Petition For Certiorari Should Be Denied Because Cross-Petitioners Prevailed On The Merits Below, And The Grounds Urged In The Cross Petition Can Be Raised In Support Of The Lower Court's Judgment If Cross-Respondent's Petition For Certiorari Is Granted.

Cross Petitioners, officials of the State of Washington ("the State" hereinafter) have petitioned this Court for review of an issue which was raised but not decided in the Court of Appeals. Hagler v. Callahan, 764 F.2d 711, 713 fn.2 (9th Cir. 1985). However, the State gained in the Court of Appeals all the relief it could gain, i.e., denial of the habeas corpus petition of Cross-Respondent David F. Hagler. Id. at 716.

In these circumstances, there is no basis for an independent grant of the State's Cross Petition For Writ Of Certiorari. If Mr. Hagler's Petition For Writ Of Certiorari (No. 85-1394) is granted, "The State as respondent may make any argument presented below that supports the judgment of the lower court,"

240 n.6 (1977) (citation omitted). This obviously includes the procedural ground not decided by the Court of Appeals but raised in the State's Cross Petition here. If Mr. Hagler's Petition is not granted, the Cross Petition should not be granted either, since the State will have been afforded all the relief to which it could be entitled. Cf. United States v. Raines, 362 U.S. 17, 27 n.7 (1960). Indeed, rather than being a serious cross petition raising an issue which could lead to greater relief for a party who prevailed below, the State's Cross Petition here seems to have been filed "out of an excess of caution" to insure that the procedural issue has been preserved for review if Mr. Hagler's Petition is granted. Stelos v. Hosiery Motormend Corp., 295 U.S. 237, 239 (1935). Although the State cannot be faulted for making sure the issue can be raised, this nevertheless provides no reason for this Court to grant the State's

Moreover, even if consideration of the State's issue were not totally dependent on whether Mr. Hagler's Petition is granted, a grant of certiorari would nevertheless be inappropriate. There is no serious "on-going conflict" between the state and federal courts on the issue raised, as the State claims. See Cross Petition at 8. To counsel's knowledge, the United States Court Of Appeals For The Ninth Circuit has never decided the issue the State raises. This Court should not, at the State's behest, create and then try to resolve such an alleged "conflict" unless and until it exists. At most, this Court should remand this case to the Court of Appeals for consideration of the State's issue in the first instance.[1]

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[1]It is quite possible that the entire case will be returned to the Ninth Circuit for consideration in light of this Court's pending decision in Rose v. Clark, No. 84-1974, argued March 24, 1986, depending, of course, upon what that decision is. The harmless error issues

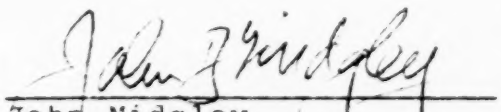
presented in Mr. Hagler's Certiorari Petition are similar or identical to the issues presented in Rose. See Petition in No. 85-1394 at 1.

See United States v. Cronic, 466 U.S. 648, 666-667 (1984). Then, if the State did not prevail in the Court of Appeals, it would be more appropriate for the State to petition this Court for review of an adequately developed issue. But in the present posture of the case a grant of Certiorari to consider the State's issue, prematurely and in isolation from the rest of the case, would be thoroughly inappropriate.

CONCLUSION

For the foregoing reasons, the Cross Petition For Writ Of Certiorari should be denied.

Respectfully submitted this 18th day of April, 1986.



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Cross-Respondent